

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

FEB 23 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2006-0332-PR
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
JASON SCOTT GUNDERSON,)	Not for Publication
)	Rule 111, Rules of
Petitioner.)	the Supreme Court
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. CR2004-340

Honorable R. Douglas Holt, Judge

REVIEW GRANTED; RELIEF DENIED

Kenneth A. Angle, Graham County Attorney
By Stuart Ross

Safford
Attorneys for Respondent

Meredith Little

Tucson
Attorney for Petitioner

V Á S Q U E Z, Judge.

¶1 Petitioner Jason Scott Gunderson pled guilty in Graham County to charges of possessing drug paraphernalia and aggravated driving with a drug in his body. The trial court

placed him on four years' probation in January 2005. He was subsequently arrested in Pima County and charged with additional drug offenses. In June 2005, a petition to revoke his probation was filed in Graham County. In July, Gunderson pled guilty in Pima County to soliciting possession of a dangerous drug for sale. In November, he admitted having violated his Graham County probation conditions by committing the Pima County offense.

¶2 Gunderson was sentenced for the Pima County offense before the disposition hearing was held in Graham County on his probation violation. The Pima County judge ordered him to serve a presumptive, 2.5-year prison term, which the court ordered to be served concurrently "with whatever sentence you receive in Graham . . . County." But when the Graham County court revoked his probation and sentenced Gunderson to another presumptive, 2.5-year prison term on the more serious of his two Graham County offenses, it ordered that sentence to be served consecutively to the Pima County sentence.

¶3 Gunderson then filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., contending the Graham County court abused its discretion by ordering his second sentence to be served consecutively to the sentence previously imposed in Pima County. He sought to be resentenced to serve the two concurrently, as the Pima County judge had envisioned. The Graham County court denied post-conviction relief, and this petition for review followed. We will disturb a trial court's grant or denial of post-conviction relief only for a clear abuse of discretion, *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990), which did not happen here.

¶4 In denying relief, the trial court relied on *State v. King*, 166 Ariz. 342, 344, 803 P.2d 1041, 1043 (App. 1990), which held that a trial court may not order a sentence it imposes to be served consecutively to a sentence yet to be imposed by a different court in another matter. Among the several reasons it gave for its ruling, the *King* court rightly observed that the prior imposition of a consecutive sentence “may interfere with the sentencing discretion of the court that is to impose the future sentence.” *Id.* Gunderson seeks to distinguish *King* on the ground that the prior sentence in *King* was ordered to be consecutive to the future sentence whereas the first sentence here was ordered to run concurrently. In doing so, Gunderson misses the essential point.

¶5 In ordering a sentence to be either concurrent or consecutive “to a sentence that may be imposed in the future, [a court] does so without knowing what the length of the future sentence, if any, will be. It therefore lacks a complete basis for the exercise of its discretion.” *Id.* That fact, in combination with the real possibility of interfering with the sentencing discretion of the court that imposes the later sentence, makes it inappropriate for a sentencing court to specify that a sentence it imposes should be either concurrent or consecutive to some other, anticipated sentence that has yet to be imposed. *Id.*; see also *State v. Moreno*, 173 Ariz. 471, 474, 844 P.2d 638, 641 (App. 1992) (imposing state sentence to be concurrent with unimposed federal sentence improper as being both difficult to implement and restrictive of federal court’s sentencing discretion).

¶6 According to the Graham County court’s minute entry denying post-conviction relief, the Pima County court has since acknowledged having “exceeded its authority” in ordering the sentence it imposed to be concurrent with a sentence that was yet to be imposed in Graham County, based on *King*. We agree and thus find no abuse of the Graham County court’s discretion, either in imposing a consecutive sentence following the revocation of Gunderson’s probation or in subsequently denying his petition for post-conviction relief.

¶7 Although we grant the petition for review, we deny relief.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

JOHN PELANDER, Chief Judge

JOSEPH W. HOWARD, Presiding Judge